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NOT RECOMMENDED FOR PUBLICATION

No. 22-1264

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED Dec 29, 2022
DEBORAH S. HUNT, Clerk

MARION SINCLAIR, Plaintiff-Appellant, v. ANDREW E. MEISNER, in his official capacity as Oakland County Treasurer, et al., Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

O R D E R

Before: SUTTON, Chief Judge; CLAY and BUSH, Circuit Judges.

Marion Sinclair appeals the district court's judgment denying her motion for leave to file a second amended class-action complaint and dismissing her civil-rights action. Because the district court partially erred in finding that Sinclair's proposed amended complaint would be futile, we vacate the district court's judgment in part and affirm in part.

In 2019, Sinclair filed an amended complaint against Oakland County, Michigan; the Oakland County Tax Tribunal; Oakland County Treasurer Andy Meisner; the City of Southfield, Michigan; the Southfield Non-Profit Housing Corporation

("SNPHC"); the Southfield Neighborhood Revitalization Initiative, LLC ("SNRI"); Habitat for Humanity; GTJ Consulting, LLC; JBR Disposal, LLC; and various officers, employees, and agents of these entities. She alleged that the defendants discriminated against her and other African American homeowners in the City of Southfield by foreclosing on their properties to satisfy delinquent tax debts and failing to reimburse them for the equity in their homes. She alleged that, through a series of real estate transactions, the defendants deprived the original homeowners of their right to bid on and repurchase their homes at a county auction. Ultimately, the corporate defendants sold or sought to resell the properties for a profit. Based on these allegations, Sinclair claimed that the defendants violated the Fair Housing Act of 1968, 42 U.S.C. § 3604(a); the Fifth and Fourteenth Amendments; civil racketeering statutes; the Michigan Constitution; and various state statutes. Sinclair sought class certification of all affected homeowners, a preliminary injunction preventing further resale of her property, permanent injunctive relief, and compensatory and punitive damages.

Many of the defendants moved to dismiss the complaint under either Federal Rule of Civil Procedure 12(b)(1), for lack of subject-matter jurisdiction, or under Rule 12(b)(6), for failure to state a claim upon which relief could be granted. A magistrate judge recommended dismissing the case without prejudice, finding that Sinclair's federal claims were barred by the Tax Injunction Act and principles of comity and that the court should decline to exercise supplemental jurisdiction over Sinclair's state-law claims. The

magistrate judge alternatively recommended dismissing some claims as barred by the *Rooker-Feldman*[1] doctrine. Sinclair filed a general objection to the magistrate judge's report and recommendation and sought leave to file an amended complaint. The district court adopted the magistrate judge's report and recommendation, noting that Sinclair did not "make any specific objections" to the magistrate judge's findings. It declined to rule on Sinclair's request to amend her complaint, choosing instead to stay the case until we decided *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020). Once we decided *Freed*, the district court gave Sinclair an opportunity to file a motion to amend her complaint.

Sinclair obtained counsel and moved to file a second amended class-action complaint. Her proposed complaint named as defendants Oakland County; the City of Southfield; SNPHC; SNRI; Southfield city administrator, SNPHC board member, and SNRI manager Frederick Zorn; and Southfield mayor, SNPHC board manager, and SNRI manager Kenson Siver. Sinclair alleged that the defendants engaged in a conspiracy to enrich themselves by depriving her and the putative class members of the equity in their properties. According to Sinclair, the scheme played out as follows. Once Oakland County foreclosed on the tax-delinquent properties, it either sold the properties at auction and retained the entire amount of the sale proceeds or it allowed the City of Southfield, before any public auction, to exercise its "right of first refusal." This process was consistent with Michigan's General Property Tax Act ("GPTA"), Mich. Comp. Laws §§ 211.1-211.157, before the Act was amended

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[1] *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 415-16 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).

in 2021. The right of first refusal allowed the City of Southfield to obtain title to a property by paying the unpaid taxes and any fees owed. SNPHC gave the City of Southfield the funds that the City used to exercise its right of first refusal. The City of Southfield then transferred ownership of the properties to SNRI, a for-profit corporation that was wholly owned by SNPHC, for one dollar. SNRI sold the properties to third-party buyers at fair market value, pocketing tens or even hundreds of thousands of dollars in profit. In all cases, Sinclair and the other putative class members were deprived of the equity in their properties—the property value that exceeded the amount of the unpaid taxes and fees. Sinclair questioned whether the GPTA, as it existed before the 2021 amendments, allowed Oakland County to keep sale proceeds that exceeded the amount of the delinquent taxes and fees. She alleged that, if it did, it violated the United States' and Michigan's Constitutions.

With respect to her property in particular, Sinclair alleged that she owed $22,047.46 in back taxes when Oakland County foreclosed in 2015. Oakland County then transferred the property to the City of Southfield for $28,424.84, meaning that Oakland County received a "surplus" of $6,377.38. Sinclair alleged that the defendants "specifically selected properties for this scheme that had a large amount of [e]quity in relation to the amount of unpaid taxes and expenses, preferring properties with no mortgages, in order to maximize the amount of [e]quity realized by SNRI." She further alleged that Zorn and Siver, who were both Southfield city officials and board members and managers of SNPHC and SNRI, personally benefitted from the arrangement.

The proposed second amended complaint set forth five claims:[2] (1) Oakland County and the City of Southfield violated the plaintiff's and putative class members' Fifth and Fourteenth Amendment rights by taking the equity in their properties without just compensation; (2) Oakland County and the City of Southfield violated Article X, Section 2 of the Michigan Constitution by taking the equity in their properties without just compensation; (3) Oakland County and the City of Southfield violated the plaintiff's and putative class members' procedural due process rights by failing to provide a process to challenge the forfeiture of their equity interests; (4) the defendants unjustly enriched themselves by refusing to compensate the plaintiff and putative class members for the equity in their homes; and (5) the defendants engaged in a civil conspiracy, in violation of 42 U.S.C. § 1983, to deprive the plaintiff and putative class members of the equity in their homes. Sinclair sought class-action certification, declaratory relief, compensatory damages, and exemplary and punitive damages. The district court denied leave to file the second amended complaint and dismissed the case with prejudice, finding that Sinclair's proposed amendments would be futile because they failed to state a claim upon which relief could be granted.

On appeal, Sinclair argues that the district court erred in dismissing her takings, due process, unjust-enrichment, and civil-conspiracy claims because it

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[2] The proposed second amended complaint included a sixth "count," which sought declaratory relief but did not clearly set forth a separate "claim" for relief. In any event, Sinclair's appellate brief addresses only the takings, due process, unjust-enrichment, and civil-conspiracy claims set forth in counts one through five.

erred in finding that she and the putative class members did not have a cognizable property interest in the equity of their homes and the surplus funds that the City of Southfield paid to Oakland County when exercising its right of first refusal.

As an initial matter, Sinclair forfeited any challenge to the district court's order dismissing her first amended complaint, because she filed only a general objection to the magistrate judge's report and recommendation. In her objection, Sinclair noted that she had "many objections to the [m]agistrate [j]udge's report and recommendation" but that she would prefer to file a second amended complaint "in light of recent developments in the law and facts in this case." Because Sinclair did not identify any specific error in the magistrate judge's reasoning, and because the district court recognized this and declined to conduct a de novo review, Sinclair forfeited her right to appeal the order dismissing her first amended complaint. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Frontier Ins. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006). Further, because the district court dismissed the first amended complaint without prejudice and we can review the district court's denial of Sinclair's motion to file a second amended complaint, "the interests of justice" do not warrant excusing the forfeiture. *Thomas*, 474 U.S. at 155.

If a district court denies leave to file an amended complaint because amendment would be futile, we review the district court's decision de novo. *Babcock v. Michigan*, 812 F.3d 531, 541 (6th Cir. 2016). "A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss." *Beydoun v. Sessions*, 871 F.3d 459, 469 (6th Cir. 2017) (quoting *Riverview Health Inst. LLC v. Med. Mut. of*

Ohio, 601 F.3d 505, 520 (6th Cir. 2010)). To avoid dismissal under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Zakora v. Chrisman*, 44 F.4th 452, 464 (6th Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

I. Takings Claims

Sinclair's proposed second amended complaint first claims that Oakland County and the City of Southfield violated the U.S. Constitution's Takings Clause. In light of our recent decision in *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022), the district court partially erred by finding that this claim would not survive dismissal under Rule 12(b)(6). The district court found that Sinclair's proposed amendment failed to state a claim because she did not have a cognizable property interest in the equity of her home. In *Hall*, however, we held that a homeowner's equitable interest in her property is an interest that is protected by the Takings Clause. *Hall*, 51 F.4th at 194-96. By alleging that Oakland County took her property without compensating her for the equity in her home, Hall stated a Takings Clause claim against Oakland County. *See id.* As we cautioned in *Hall*, however, the only party responsible for this taking is Oakland County, the party that initially took title to the property, *id.* at 196, so the district court properly concluded that amendment would be futile to the extent that Sinclair sought to pursue a Takings Clause claim against the City of Southfield.

The second claim in Sinclair's proposed second amended complaint alleges that Oakland County and the City of Southfield violated the Michigan Constitution's Takings Clause. *See* Mich. Const., Art. X, Sec. 2. The plaintiffs in *Hall* also brought a Takings Clause

claim under the Michigan Constitution alleging that they had a vested property right in the equity that they held in their home. In *Hall,* we vacated the district court's dismissal of the Michigan Takings Clause claim with instructions to abstain from adjudicating the issue on remand under *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500–01 (1941). *Hall*, 51 F.4th at 196. The same approach applies here.

Procedural Due Process

The third claim in Sinclair's proposed second amended complaint alleges that Oakland County and the City of Southfield violated the homeowners' procedural due process rights by "failing to provide for any procedure at all . . . to secure the return of their [e]quity after their properties' sale or transfer." To state a procedural due process claim, Sinclair had to allege that the defendants deprived her of a life, liberty, or property interest that is protected by the Due Process Clause and "that the state did not afford [her] adequate procedural rights prior to depriving [her] of [her] protected interest." *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002) (quoting *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999)). The district court found that this claim would be futile because Sinclair did not have a cognizable property interest in the equity of her home. In light of *Hall*, that finding was erroneous. Sinclair also alleged that the defendants had no "procedure at all" in place for homeowners to challenge the forfeiture of their equity interests. In light of these allegations, the district court erred in finding that this claim would not survive a Rule 12(b)(6) motion. Still, because Oakland County is the only defendant that allegedly took the titles of the properties from the homeowners, Oakland County is the only defendant that is

potentially liable under § 1983. *See Hall*, 51 F.4th at 196.

II. Unjust Enrichment

Sinclair's fourth proposed claim alleges that the defendants unjustly enriched themselves by taking and retaining the equity interests in the plaintiff's and putative class members' properties. The district court found that this proposed claim would be subject to dismissal under Rule 12(b)(6) because Oakland County received only the amount of delinquent taxes and fees that Sinclair owed and Sinclair did not allege that the other defendants, who were third-party beneficiaries, engaged in misleading or deceptive conduct. "The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Innotext, Inc. v. Petra'Lex USA Inc.*, 694 F.3d 581, 594 (6th Cir. 2012) (quoting *Barber v. SMH (US), Inc.*, 509 N.W.2d 791, 796 (Mich. Ct. App. 1993)). If these elements are satisfied, "[a] contract will be implied in law to prevent unjust enrichment." *AFT Mich. v. Michigan*, 846 N.W.2d 583, 660 (Mich. Ct. App. 2014).

Sinclair alleged that the defendants received the benefit of "substantial equity" in her home and the homes of other putative class members when they obtained the titles to these homes. Again, as we recognized in *Hall*, Sinclair had a property interest in the equity of her home. *Hall*, 51 F.4th at 194-96. Sinclair alleged that her equity interest exceeded the amount that she owed in back taxes and fees, and Oakland County took this interest when it took title to the home. Sinclair therefore plausibly alleged that Oakland County received a benefit from her when it took ownership of her home. Because Sinclair had a

property interest in the equity of her home, she also plausibly alleged that she suffered an inequity when Oakland County retained that interest without compensating her for it. Thus, the district court erred in finding that an unjust enrichment claim against Oakland County would be futile. Sinclair also alleged facts from which it could be inferred that SNRI benefitted from the transfer of the homeowners' properties from the homeowners to Oakland County. Specifically, she alleged that SNRI eventually obtained the properties from the City of Southfield for one dollar and resold them for tens or hundreds of thousands of dollars in profits. However, because the homeowners' properties were not transferred directly from the homeowners to SNRI, SNRI is a third party.

A third party that benefits from an implied contract is not liable for unjust enrichment unless it "requested the benefit or misled the other parties." *Karaus v. Bank of N.Y. Mellon*, 831 N.W.2d 897, 906 (Mich. Ct. App. 2012) (per curiam) (quoting *Morris Pumps v. Centerline Piping, Inc.*, 729 N.W.2d 898, 904 (Mich. Ct. App. 2006)). Sinclair's allegations could not support a finding that SNRI requested a benefit from either Oakland County or Sinclair. According to the allegations in the proposed second amended complaint, SNRI entered into an agreement with the City of Southfield to obtain the properties in question only after Oakland County acquired ownership of the properties. And it was the City of Southfield, not SNRI, that obtained title from Oakland County. Sinclair also did not allege that SNRI misled either Oakland County or Sinclair.

Sinclair did not allege that the remaining defendants received a benefit from the implied contracts between the homeowners and Oakland County. She

alleged that the City of Southfield was a mere intermediary that used funds provided by SNPHC to obtain the properties from Oakland County and then transferred the properties to SNRI for a nominal fee of one dollar. And SNPHC merely provided the City of Southfield with the funds that the City needed to exercise its right of first refusal. Sinclair alleged that Zorn and Siver were managers of SNRI and board members of SNPHC, which wholly owned SNRI. She also alleged that Zorn and Siver "benefitted personally and professionally" from these property transactions, but she did not include any specific factual allegations that, if true, would support that conclusion. Such conclusory allegations are insufficient to state a claim for relief. *See Iqbal*, 556 U.S. at 678.

III. Civil Conspiracy

Finally, Sinclair alleged in the proposed second amended complaint that the defendants engaged in a civil conspiracy, in violation of § 1983. "Civil conspiracy under § 1983 requires evidence of 'an agreement between two or more persons to injure another by unlawful action.'" *Boxill v. O'Grady*, 935 F.3d 510, 519 (6th Cir. 2019) (quoting *Memphis, Tenn. Area Loc., Am. Postal Workers Union, AFL-CIO v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004)). To state a civil conspiracy claim, Sinclair had to allege that "(1) a single plan existed, (2) the conspirators shared a conspiratorial objective to deprive the plaintiffs of their constitutional rights, and (3) an overt act was committed in furtherance of the conspiracy that caused the injury." *Marvaso v. Sanchez*, 971 F.3d 599, 606 (6th Cir. 2020) (quoting *Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014)). "Although circumstantial evidence may prove a conspiracy, [i]t is well-settled that conspiracy claims must be pled with some

degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Id.* (alteration in original) (quoting *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 563 (6th Cir. 2011)).

The district court found that Sinclair's civil-conspiracy claim would be futile because she failed to plausibly allege that any defendant violated her constitutional rights. This finding, again, is erroneous in light of *Hall*. Because decisions regarding motions for leave to amend are subject to the district court's discretion, the district court should reevaluate Sinclair's civil conspiracy claim in light of *Hall*. *See Graveline v. Benson*, 992 F.3d 524, 546 (6th Cir. 2021).

IV. Federal Rule of Civil Procedure 5.1

One argument raised by several defendants on appeal warrants further discussion. Several defendants argue that the district court properly dismissed the case because Sinclair did not serve notice on the Michigan Attorney General that she was challenging the constitutionality of the GPTA, as required by Federal Rule of Civil Procedure 5.1. As Sinclair points out, however, Rule 5.1 itself states that "[a] party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted." Fed. R. Civ. P. 5.1(d). Further, because the district court denied leave to file the proposed second amended complaint, the complaint was never "filed," and Rule 5.1 may not have been triggered. *See* Fed. R. Civ. P. 5.1(a) ("A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly . . . file a notice.").

For the foregoing reasons, we **VACATE** the district court's judgment to the extent that it denied Sinclair leave to file a second amended complaint alleging a federal takings claim, a procedural due process claim, an unjust-enrichment claim against Oakland County, and a state takings claim against Oakland County and the City of Southfield, and a civil conspiracy claim, and we **REMAND** for further proceedings on those claims. We otherwise **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARION SINCLAIR, Plaintiff, vs. **ANDY MEISNER,** et al., Defendants.	**2:18-CV-14042-TGB-MJH** **ORDER DENYING MOTION TO FILE SECOND AMENDED CLASS ACTION COMPLAINT**

Michigan resident Marion Sinclair, plaintiff in this case, alleges that the Defendants, various local government units, private entities, and public officials, have conspired to unconstitutionally deprive Plaintiff and others of their equity in their homes by taking them in tax foreclosure proceedings. Plaintiff's original complaint was dismissed without prejudice, but the case was stayed because parties and the Court believed that the Sixth Circuit's pending ruling in *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020), would have some bearing on the merits of any amended complaint. ECF No. 39. It did not, so following the decision by the Court of Appeals in *Freed*, Plaintiff timely filed a motion to amend with a proposed amended complaint attached. Defendants respond in opposition, arguing the law does not recognize the property right of which Plaintiff claims to be deprived, and that any amendment would be futile. For the reasons that follow, the Motion to Amend the Complaint is **DENIED**.

I. BACKGROUND

Marion Sinclair seeks to represent a proposed class of former property owners in Southfield who claim to have been unconstitutionally deprived of property interests when their homes were lost through tax foreclosure proceedings. Proposed Am. Compl. ¶ 61, ECF No. 51-1, PageID.825.

Understanding Plaintiff's legal claims requires a preliminary discussion of the Michigan General Property Tax Act ("GPTA"). MCL §§ 211.1-211.157. The GPTA's purpose is to facilitate the efficient payment of property taxes and the efficient return of delinquent properties back to the tax rolls. When relevant municipal authorities determine that taxes are past due on a property, the owner of the property faces one of two scenarios: (1) the owner is able, within the statutory time limits, to pay their back taxes and redeem their property, or (2) the property is foreclosed on and sold, and the property is returned to the tax rolls after the municipality recovers as much as it can in owed taxes and fees.

The treasurer of a county can elect to act as the "foreclosing government unit" or "FGU" who facilitates the resolution of any delinquent tax payments and administers notification regarding redemption opportunities and eventual foreclosure and sale. If the county treasurer does not elect to act as the FGU, the state will. However, most counties in Michigan (including Oakland County, where Southfield is located) have elected to have their treasurer perform this function. MCL 211.78.

The GPTA sets out the procedures and timelines that govern this process. Each year, property taxes unpaid as of March 1 are identified to the treasurer as

delinquent. Once a property becomes delinquent, the treasurer initiates a prescribed schedule of notice and hearing opportunities over the course of twelve months, giving owners a chance to redeem their property. MCL 211.78b-g. If the property is not redeemed in that time, it is "forfeited" to the treasurer. This does not affect title, but allows the treasurer to list the property on the tax rolls as forfeited and file a petition in circuit court seeking foreclosure. The GPTA also includes notice procedures and requirements regarding this foreclosure hearing in circuit court, creating continuing opportunities for redemption by the owner. MCL 211.78h. The taxpayer's right to redeem the property expires on the March 31 immediately following entry of judgment on the foreclosure petition (generally falling about two years after the initial delinquency finding). If delinquent taxes are not paid by that date, title transfers to the treasurer. MCL 211.78k(5)-(6).

During the time frame when the events at issue in this lawsuit occurred, the statute required that after title transferred to the treasurer, the municipality where the property was located had a right of first refusal ("ROFR") to buy the property for a "minimum bid" equal to the delinquent taxes and any fees owed. *See* ECF No. 51-1, PageID.819. If the relevant municipality did not exercise its ROFR, the property would usually be put up for auction by the treasurer to attempt to recover what was owed. Any monies obtained by the treasurer, either through a ROFR sale or through auction, went towards a general fund used to pay off delinquent taxes to municipalities. *See generally Rafaeli, LLC v. Oakland Cty.*, 952 N.W.2d

434, 443-49 (Mich. 2020) (providing an overview of the GPTA framework).[1]

In Plaintiff's case, she fell behind on the property taxes for her home in Southfield sometime between 2013-14. Her property forfeited to the Oakland County Treasurer around June 12, 2015. Proposed Am. Compl. ¶ 56, ECF No. 51-1. A judgment of foreclosure was entered in Oakland County Circuit Court on February 2, 2016. *Id.* at ¶ 57. Plaintiff was not able to redeem her property before March 31, 2016, so title vested in the Oakland County Treasurer. *Id.* The delinquency on her property was reported on the judgment of foreclosure as $22,047.46. *Id.* at ¶ 58. On July 7, 2016, the City of Southfield exercised its ROFR and purchased the property for $28,424.84. On September 22, 2016, the property was conveyed to the Southfield Neighborhood Revitalization Initiative, a for-profit limited liability company or LLC, for $1. *Id.* at ¶ 60.

Plaintiff makes several allegations as to how this sequence of events violated her constitutional rights. She is suing a variety of Defendant actors that can be separated into three groups: (1) the Oakland Defendants (Oakland County and Andy Meisner, Oakland County Treasurer), (2) the Southfield Public Defendants (the City of Southfield, City

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[1] The Michigan legislature has since amended the GPTA and significantly modified the post-foreclosure procedure; these changes went into effect for any properties found to be delinquent after January 1, 2021. Now, municipalities wishing to exercise the right of first refusal on a foreclosed property must pay the greater of the minimum bid or the fair market value of the property. MCL 211.78m. The legislature has specifically noted that this provision is not retroactive unless the Michigan Supreme Court decides it is. MCL 211.78t(1)(b).

Administrator Frederick Zorn, and Mayor Kenson Siver), and (3) the Southfield Private Defendants (the Southfield Nonprofit Housing Corporation or "SNHC" and the Southfield Neighborhood Revitalization Initiative or "SNRI").[2]

First, Plaintiff alleges that because Southfield paid more for her property than her actual delinquency, Oakland County received a surplus of funds when it sold her home, which should be paid out to her. Second, and more centrally, she alleges the various Southfield Public and Private Defendants are involved in a "scheme" to deprive certain homeowners of their properties at low prices so that they can "flip" them and make a profit on them, without compensating the owners. The alleged scheme goes like this: the non-profit SNHC funds Southfield's purchase of these properties through the ROFR process; then, Southfield sells the properties to the for-profit SNRI for the minimal consideration of $1; eventually, SNRI sells them for a much larger profit.[3] SNRI is alleged to have been incorporated in 2016 with the blessing and knowledge of Southfield city administrators for the sole purpose of acting as the "receiving" entity for these properties. By selling the forfeited property,

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[2] Plaintiff indicates that any other Defendants previously named in the lawsuit would not be included in the proposed Second Amended Complaint. ECF No. 51, PageID.805.

[3] Although the above chain of events describes the typical "scheme" according to Plaintiff, and this type of sale has occurred in other, similar lawsuits brought in this District, in our case the record does not indicate whether SNRI has yet re-sold Plaintiff's house or otherwise made any profit on it.

SNRI realizes any "equity" in the property,[4] alternatively characterized as its fair market value or the difference between the delinquency and whatever profit that is eventually made from the sale. The dollar value of that equity, under this system, is never returned to the original homeowner. *See* ¶¶ 34-45, ECF No. 51-1.

Plaintiff asserts in her proposed Second Amended Complaint that the post-foreclosure sales of her property to Southfield and then to SNRI constituted an illegal taking in violation of the Fifth and Fourteenth Amendments and Article X, Section 2 of the Michigan Constitution, and that they involved procedural due process violations under the Fourteenth Amendment. She also brings claims of unjust enrichment and civil conspiracy. The Court issued a consolidated briefing schedule in response to the instant motion, which all Parties timely followed, and then heard oral argument on January 5, 2022. In addition to the anticipated briefing, Plaintiff also filed a supplemental brief related to the issue of whether Oakland County truly received a surplus payment, to which the Southfield Public Defendants filed a response and Plaintiff filed a reply. ECF Nos. 59, 60, 61. These issues are now ripe for review.

II. STANDARD OF REVIEW

The decision to grant or deny a motion to amend is within the sound discretion of the Court. *See Robinson v. Michigan Consol. Gas Co., Inc.*, 918 F.2d 579, 591 (6th Cir. 1990). A party may amend a pleading after the opposing party's responsive

[4] Plaintiff alleges that SNRI is "controlled in large part by City of Southfield officials," implying that Southfield also receives some benefits from SNRI's activities. ¶ 5, ECF No. 51-1.

pleading has been filed only by leave of court or by written consent of the adverse party. Fed. R. Civ. P. 15(a)(2). Rule 15(a) provides that "leave shall be freely given when justice so requires." *Id.* However, amendments should not be permitted in instances of "undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The Sixth Circuit has held that amendment is futile if a proposed amended complaint would not survive a motion to dismiss. *Neighborhood Dev. Corp. v. Advisory Council on Historic Pres.*, 632 F.2d 21, 23 (6th Cir. 1980). In evaluating whether a complaint would survive a motion to dismiss, courts "must construe the complaint in the light most favorable to the plaintiff, accept all well-pled factual allegations as true and determine whether the plaintiff undoubtedly can prove no set of facts consistent with their allegations that would entitle them to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006)).

Though this standard is liberal, it requires a plaintiff to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action" in support of her grounds for entitlement to relief. *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)). Under *Ashcroft v. Iqbal*, the plaintiff must also plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. 662, 678 (2009) (citation omitted). A plaintiff falls short if she

pleads facts "merely consistent with a defendant's liability" or if the alleged facts do not "permit the court to infer more than the mere possibility of misconduct." *Albrecht*, 617 F.3d at 893 (quoting *Iqbal*, 556 U.S. at 678-79).

III. ANALYSIS

A. The *Rafaeli* decision

An analysis of Plaintiff's claims first requires some discussion of the Michigan Supreme Court's recent decision in *Rafaeli, LLC v. Oakland Cty.*, where the Court engaged in a thorough review of the GPTA and the property rights that it conveys. 952 N.W.2d 434 (Mich. 2020).

The plaintiffs in *Rafaeli* were former homeowners whose properties were foreclosed on, under the operation of the provisions of the pre-2021 GPTA. The properties were not bought by a municipality through the ROFR, but were instead sold at auction. The proceeds at auction were often significantly greater than the amount of back taxes owed to the state. *Id.* at 438-39 (noting that although the plaintiff's delinquency at the time of foreclosure was $285.81, his property was eventually sold at auction for $24,500). Plaintiffs challenged the Oakland County Treasurer's practice of keeping those surplus funds, rather than returning them to the original property owner, as an unconstitutional taking.

The Michigan Supreme Court held that the County's failure to return the surplus from the sale to the original property owners was in fact an unconstitutional taking under the Michigan Constitution. *Id.* at 466. After recognizing that the GPTA does not specifically identify whether taxpayers have a property interest in the surplus of any proceeds from a

foreclosure sale, the Court engaged in an extensive common-law analysis and found that "an owner of real or personal property has a right to any surplus proceeds that remain after property is sold to satisfy a tax debt. Just as the Magna Carta protected property owners from uncompensated takings, it also recognized that tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess." *Id.* at 454-55. This right continues even after title transfers from the property owner to the treasurer: "[i]n the same way that the foreclosure process does not eliminate the former property owner's interest in the personal property that sits on the foreclosed land, the vesting of fee simple title to the real property does not extinguish the property owner's right to collect the surplus proceeds of the sale." *Id.* at 461.

B. Counts I and II—takings claims

Like the plaintiffs in *Rafaeli*, Ms. Sinclair seeks to bring a state inverse condemnation claim under Article X, Section 2 of the Michigan Constitution. She also brings a federal takings claim under 42 U.S.C. § 1983. ECF No. 51-1, PageID.829-32. To make out a federal takings claim, a plaintiff must (1) show a cognizable property interest and (2) show that a taking occurred. While the Constitution protects property interests, it does not create them: state, federal, and common law are the source of these interests. *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 481 (6th Cir. 2004). Although the Michigan Constitution is generally more protective of property rights than the federal Constitution, a similar analysis applies. *Rafaeli*, 952 N.W.2d at 449-50. Therefore, as a threshold matter, Sinclair must allege

a "cognizable property interest" for any takings claims to have merit.

As noted, Sinclair alleges facts supporting two theories for her takings claim. The first is that the Oakland County Treasurer received a small surplus of funds when it sold her property: an amount slightly in excess of the delinquent taxes and fees. Under the decision in *Rafaeli*, the treasurer's retention of that excess amount is an unconstitutional taking. The second theory is that the combined actions of Oakland County and Southfield have deprived her of a property interest as related to the equity in her property, because the actual value of her house was much more than just the tax delinquency. She alleges that her property should have been sold for its "fair market value" with any surplus proceeds over the tax delinquency returned to her, and that Oakland County's failure to do so is a taking without just compensation.

1. Surplus theory

Plaintiff is correct that according to the holding of *Rafaeli*, if Oakland County were to sell her house, receive an amount in excess of the tax delinquency owed, and fail to return it to her, this would be an unconstitutional taking. As evidence that Oakland received a surplus, she points to the fact that the dollar figure listed on the judgment of foreclosure for her house ($22,047.46) is less than the amount Southfield eventually paid for her house ($28,424.84). *See generally* ECF No. 59. But in emails included as exhibits to Plaintiff's briefing and at oral argument, counsel for the Oakland Defendants explained that the dollar figure on the foreclosure judgment was missing several years of delinquent taxes on it and that the amount Southfield eventually paid exactly equals the amount that was owed on the property.

ECF No. 59-1. Defendants provided evidence of the delinquencies from each year that Plaintiff did not pay taxes, and those figures add up to $28,424.84. *Id.* Given this explanation for the discrepancy, the Court finds that Plaintiff has not shown more than a "mere possibility of misconduct" on the part of the Oakland Defendants. If they did not in fact retain a surplus from the sale, Plaintiff's takings claim under this theory would not survive a motion to dismiss.

2. Equity theory

Plaintiff's second argument is that her "cognizable property interest" was not just in any surplus proceeds, but in the fair market value or equity of her home. A similar argument was advanced by the plaintiffs in *Rafaeli*, but the Michigan Supreme Court clearly defined the property interest it was recognizing as the "surplus proceeds" paid to the treasurer as a result of the sale by auction, and only that. 952 N.W.2d at n.134 (holding that "the property improperly taken was the surplus proceeds, not plaintiffs' real properties," and stating that "we are unaware of any authority affirming a vested property right to equity held in property generally."). So the problem with Plaintiff's argument is that it advances a theory that was explicitly not recognized by the majority opinion in *Rafaeli*. Plaintiff does find support for her theory in the concurring opinion of Justice Viviano ("I conclude that the property right that has been taken from the plaintiffs is their equity in their respective properties and not any independent interest in the surplus proceeds from the tax-foreclosure sale."), *id.* at 467, but this theory was not adopted by the majority, which stated that the Court was "unaware of any authority affirming a vested property right to equity held in property generally."

Plaintiff's theory was *not* the holding of the case, and the fact that the majority did not follow Justice Viviano suggests that Plaintiff's theory is not consistent with *Rafaeli*. Additionally, post-*Rafaeli*, courts in this district have uniformly interpreted that case as foreclosing the "equity as a cognizable property interest" argument. *See Hall v. Meisner*, No. 20-12230, 2021 WL 4522300, at *10 (E.D. Mich. Oct. 4, 2021) (Borman, J.); *Freed v. Thomas*, No. 17-CV-13519, 2021 WL 942077, at *4 (E.D. Mich. Feb. 26, 2021) (Friedman, J.); *Est. of Johnson v. Meisner*, No. 19-11569, 2021 WL 3680479, at *4-5 (E.D. Mich. Aug. 18, 2021) (Tarnow, J.).

Plaintiff argues that there are factual differences between the cases. It is true that the "equity" argument in *Rafaeli* was not the main issue under consideration. In that case the State directly received the surplus in proceeds—in which the Court recognized that the original property owner had a clear property interest. The question of whether there is also a property interest in "equity" arose when the *Rafaeli* Court discussed what just compensation should be available to the plaintiffs as a remedy for the unconstitutional taking they suffered. But in making this determination, the Court stated that just compensation is only due for "property taken." That compensation was subsequently calculated to be only the surplus proceeds. 952 N.W.2d at 465. The Michigan Supreme Court was not confronted with a case like this one, where the state did not receive any surplus in proceeds but where the state's procedure nonetheless deprived the homeowner of any equity or fair market value that might be left in the property after the delinquency was paid. But the "just compensation" analysis from *Rafaeli* strongly suggests that the Michigan Supreme Court would not accept

Plaintiff's argument that there is a vested property interest in equity generally.

The Court acknowledges the concerns raised by Justice Viviano's concurring opinion, which questions the logic of the majority's conclusion that homeowners have a property right in surplus proceeds, but not in equity. Most homeowners would probably find the concept that they do not have any property interest in the equity of their homes to be confusing and counter-intuitive. The *Rafaeli* holding also leads to the strange situation where Ms. Sinclair could have recognized some value out of her property if it had sold at *auction* for more than the amount of her delinquency; however, because Southfield bought her house through its ROFR for the amount of the delinquency, and sold it to a for-profit entity which could then resell it and realize the value of the home's equity, Ms. Sinclair will get nothing. A property interest in "surplus proceeds" only arises if, in the process of a sale, a surplus is generated. As Justice Viviano noted in concurrence, by limiting the property interest in this way, the framework provided by the majority opinion "does not consider the property interests that exist before the sale." 952 N.W.2d 434, 474 (2020) (Viviano, J., concurring).

In response to *Rafaeli*, the Michigan Legislature amended the GPTA so that state or municipal entities seeking to exercise a ROFR must pay the greater of the delinquency on the property *or* the property's fair market value. If the ROFR sale is made at the fair market value, the treasurer must turn over any amount of the sales price in excess of the delinquent taxes to the former property owner. MCL 211.78m(1). This action by the legislature does appear to be directed toward allowing former property owners to

realize the equity in their homes, even if they are lost to foreclosure. However, the sales described in this case were lawful at the time of the forfeiture of Plaintiff's property, and as discussed, the argument she advances in support of an unconstitutional taking has not been accepted by the Michigan Supreme Court. The Court's ruling in this case therefore reflects its best interpretation of how the Michigan Supreme Court would rule if the question were before it.

The Court finds that neither of Plaintiff's takings claims would survive a motion to dismiss, making amendment futile.

C. Count III—procedural due process

Plaintiff also makes a due process claim against Oakland and Southfield, alleging that she and the proposed class members were deprived of due process as related to their property interest in equity. Importantly, Plaintiff is not challenging any of the procedure or process leading up to the *foreclosure* on her property. Rather, she alleges she was unconstitutionally denied her equity—the fair market value of her home—because *post*-foreclosure, there was no process in place for her to redeem any excess funds if Oakland or a subsequent buyer (such as SNRI here) ended up paying that fair market value for her property. ¶¶ 93-98, ECF No. 51-1. But there must be an identifiable property interest to even raise the question of due process related to that interest, and the Court has already determined there is no property interest in the equity or fair market value of the home during foreclosure proceedings. Therefore, this claim also could not survive a motion to dismiss.

D. Count IV—unjust enrichment

Plaintiff next makes a claim of unjust enrichment against all Defendants. "A claim of unjust enrichment requires the complaining party to establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus v. Bank of New York Mellon*, 831 N.W.2d 897, 905 (Mich. Ct. App. 2012). If the "benefit" in question does not flow directly from a plaintiff to a defendant, but instead goes to a third-party defendant, the plaintiff can only hold the third party liable if they can show some "misleading act by the third person" that eventually lead to them receiving the benefit. *Id.* at 906.

Defendants make various arguments as to why they have not been unjustly enriched. The Oakland Defendants maintain that the county did not receive any surplus, and that therefore there is no "benefit" that it can be shown to have received. ECF No. 52, PageID.861. This is true, as discussed above. The Southfield Public Defendants state that they legally purchased the property under the GPTA from Oakland and that even if there was some surplus, it did not go to Southfield, meaning they did not receive any "benefit." ECF No. 54, PageID.1074. This is also accurate. The Southfield Private Defendants' response is that they have no obligation under law or equity to return the proceeds of any future sale to Plaintiff—they lawfully acquired the property and have no legal obligation to her. ECF No. 53, PageID. 950-53. All three groups of Defendants conclude that any unjust enrichment claim is futile because it would be dismissed under a 12(b)(6) motion.

The gist of Plaintiff's argument is that it is unjust for any entity to profit off her former property without her receiving any of the benefit. To begin, there is no plausible evidence that the Oakland Defendants *did* receive any profit or benefit. They received the delinquent taxes and nothing more. To the extent that the subsequent property owners—the City of Southfield or the SNRI—received a benefit, they are third-party beneficiaries, and Plaintiff has not shown any misleading or deceptive conduct on their part. Each transaction in this case was lawful and followed the requirements of the then-applicable GPTA. An unjust enrichment claim would not survive a motion to dismiss.

E. Count V—civil conspiracy

Plaintiff's last claim is for civil conspiracy under 42 U.S.C. § 1983, defined as "an agreement between two or more persons to injure another by unlawful action." *Bazzi v. City of Dearborn*, 658 F.3d 598, 602 (6th Cir. 2011) (quoting *Revis v. Meldrum*, 489 F.3d 273, 290 (6th Cir. 2007). Here, the unlawful action would be an alleged violation of Plaintiff's constitutional rights; there is no allegation that Defendants failed to follow procedures in the GPTA. But because the Court has already determined Plaintiff cannot make out a cognizable violation of her constitutional rights, she cannot maintain civil conspiracy claim either.

CONCLUSION

For the reasons set out above, Plaintiff's Motion to Amend is **DENIED.** Because the proposed amendments would be futile, the Complaint must be, and hereby is, **DISMISSED WITH PREJUDICE**.

SO ORDERED, this 28th day of February, 2022.

BY THE COURT:

/s/Terrence G. Berg
TERRENCE G. BERG
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARION SINCLAIR, Plaintiff, vs. **ANDY MEISNER, ET AL.,** Defendants.	2:18-cv-14042-TGB **ORDER ADOPTING REPORT AND RECOMMENDATION (DKT. 34); GRANTING MOTIONS TO DISMISS (ECF NOS. 13, 15, 17); STAYING CASE**

I. Report and Recommendation

This matter is before the Court on Magistrate Judge Michael J. Hluchaniuk's January 9, 2020 Report and Recommendation (ECF No. 34), recommending that Defendants' Motions to Dismiss (ECF Nos. 13, 15, 17) be **GRANTED**.

The Court has reviewed the Magistrate Judge's Report and Recommendation. The law provides that either party may serve and file written objections "[w]ithin fourteen days after being served with a copy" of a report and recommendation. 28 U.S.C. § 636(b)(1). The district court will make a "*de novo* determination of those portions of the report . . . to which objection is made." *Id.* Where neither party objects to the report, the district court is not obligated to independently review the record. *See Thomas v. Arn*, 474 U.S. 140, 149-52 (1985).

In this case, Plaintiff filed an objection to the Report and Recommendation, but did not specifically

object to any of the Magistrate Judge's findings. ECF No. 35. Instead, Plaintiff requests thirty days to file an amended complaint that would eliminate all but her Fifth, Eighth, and Fourteenth Amendment claims. *Id.*

Because Plaintiff failed to make any specific objections, the Court will accept the Magistrate's Report and Recommendation of January 9, 2020 as this Court's findings of fact and conclusions of law. *See Cole v. Yukins*, 7 F. App'x 354, 356 (6th Cir. 2001) ("The filing of vague, general, or conclusory objections does not meet the requirement of specific objections and is tantamount to a complete failure to object.").

II. Request to Amend the Complaint

Plaintiff seeks to file an amended complaint containing only Fifth, Eighth and Fourteenth Amendment claims. ECF No. 35. Plaintiff's amended complaint would no longer seek injunctive relief or a reversal of the foreclosure of her property. *Id.*

Defendants contend that the Court should deny Plaintiff leave to amend because any amended complaint filed by Plaintiff would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (courts may deny leave to amend when amendment would be futile). The Defendants filed three separate responses to Plaintiff's objection, but generally argue that an amended complaint would be futile because it would still be barred by (i) the Tax Injunction Act; (ii) principles of comity; (iii) and the *Rooker-Feldman* doctrine. ECF No. 36. Defendants also assert that even if the Court did have jurisdiction over this matter, Plaintiff's claim would fail because there was no surplus equity after Defendants sold Plaintiff's property. ECF No. 36.

Since Plaintiff filed her Complaint, the Supreme Court issued its opinion in *Knick v. Township of Scott*, 139 S. Ct. 2162, 2168 (2019) and the Michigan Supreme Court heard oral argument in *Rafaeli, LLC v. Oakland County*, No. 156849. *Knick* fundamentally altered the nature of a takings claim, holding that the Takings Clause is violated at the time the government takes property without first paying compensation—meaning that a property owner no longer has to challenge the taking in state court before being legally permitted to raise their takings claim in federal court. 139 S. Ct. at 2179. Whether a post-*Knick* takings claim that does not seek to enjoin a state tax collection law or reverse a foreclosure is still precluded from review in the lower federal courts by the Tax Injunction Act, comity, and *Rooker-Feldman* is less clear, however. Those questions are currently before the Sixth Circuit in *Freed v. Thomas*, No. 18-2312 (6th Cir.).

With regard to their factual argument, Defendants assert in their responses that a takings claim would be futile because there was no surplus after the sale of Plaintiff's home. Plaintiff has not yet had the opportunity to respond to this factual assertion, however, since it came in Defendants' response to Plaintiff's objection. The Court declines to find Plaintiff's claim futile based on a factual assertion to which Plaintiff has no opportunity to respond.

Given the Sixth Circuit's forthcoming decision in *Freed*, other courts in this district facing the same jurisdictional questions have declined to rule until the *Freed* decision is issued. *See, e.g., Arkona, LLC v. Cty. of Cheboygan*, No. 1:19-CV-12372, 2020 WL 127774, at *4 (E.D. Mich. Jan. 10, 2020); *Fox v. Cty. of Saginaw by Bd. of Commissioners*, No. 1:19-CV-11887, 2020 WL 133995, at *5 (E.D. Mich. Jan. 10,

2020). The Court finds that the interests of judicial economy counsel in favor of doing the same. Accordingly, this matter shall be stayed pending the Sixth Circuit's decision in *Freed v. Thomas*, Case No. 18-2312 (6th Cir.). The parties shall file a notice with the Court no later than 30 days after the Sixth Circuit issues the mandate in that case. After the issuance of a mandate, Plaintiff may file a motion for leave to file an amended complaint.

III. Conclusion

The Report and Recommendation of January 9, 2020 (ECF No. 34), recommending that Defendants' Motions to Dismiss (ECF Nos. 13, 15, 17) be granted is **HEREBY ACCEPTED AND ADOPTED**. The Complaint is **DISMISSED WITHOUT PREJUDICE**. **IT IS FURTHER ORDERED** that this matter is **STAYED** pending the Sixth Circuit's decision in *Freed v. Thomas*. The parties shall file a notice with the Court within 30 days of the Sixth Circuit issuing a mandate. After the issuance of a mandate, Plaintiff may file a motion for leave to file an amended complaint.

DATED this 10th day of March, 2020.

BY THE COURT:

/s/Terrence G. Berg
TERRENCE G. BERG
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARION SINCLAIR, Plaintiff, v. ANDY MEISNER, *et al.*, Defendants. _____/	Case No. 18-14042 Ter1rence [sic] G. Berg United States District Judge Michael J. Hluchaniuk United States Magistrate Judge

REPORT AND RECOMMENDATION
DEFENDANTS' MOTIONS TO DISMISS
(ECF Nos. 13, 15, 17)

I. PROCEDURAL HISTORY

Plaintiff Marion Sinclair filed this action, *pro se*, challenging a state tax foreclosure action on property she owned in Southfield, Michigan, against various city and county defendants. (ECF No. 1). In March 2019, defendants filed motions to dismiss, largely challenging this Court's subject matter jurisdiction over this case. (ECF Nos. 13, 15, 17). The motions are fully briefed. (ECF Nos. 22, 23, 2, 26). In December 2019, the case was administratively reassigned to the undersigned as Magistrate Judge. On January 3, 2020, District Judge Terrence G. Berg referred pretrial matters to the undersigned. (*See* Text-Only Order dated 12/23/2019; ECF No. 33).

For the reasons stated below, the undersigned recommends this case be dismissed without prejudice.

II. FACTUAL BACKGROUND

From what can be gleaned from the pleadings, plaintiff, proceeding *pro se* in this case, was the former owner of a single-family residence at 15737 New Hampshire Drive in Southfield, Michigan which is located in Oakland County. After plaintiff fell behind in her property taxes the Oakland County Treasurer initiated forfeiture and foreclosure proceedings, on June 12, 2015, against the property pursuant to the General Property Tax Act, M.C.L. § 211.1 *et. seq.*, (GPTA). The GPTA is a statutory procedure allowing public entities to foreclose on properties that are delinquent in taxes and, in one of several alternative means, return the properties to the public rolls. The GPTA foreclosure procedure is different from the general judicial foreclosure procedure provided for in Michigan law. M.C.L. § 600.3101, *et seq*. As part of the GTPA procedure, a judgment of foreclosure was entered in the Oakland County Circuit Court on February 2, 2016. (ECF No. 17-1, PageID.464). Documents attached to the judgment of foreclosure indicate that taxes had not been paid for years 2009-2013 and that the then existing delinquency, including unpaid taxes as well as interest and fees, was $22,047.46. (ECF No. 17-1, PageID.468). Under the terms of the GPTA, M.C.L. § 211.78k(5)(b), the judgment of foreclosure ordered that title to the property was vested in the Treasurer of the County of Oakland. The property was subsequently sold to the City of Southfield on July 7, 2016, for $28,424.84. (ECF No. 15-3, PageID.381). This sale was permitted pursuant to the terms of the GPTA, M.C.L. § 211.78m(1), after the "state" failed to act on its right of first refusal. Plaintiff did not appeal or otherwise challenge the judgment of foreclosure.

On September 22, 2016, the City of Southfield deeded the property to the Southfield Neighborhood Revitalization Initiative, LLC (NRI), a non-public entity. (ECF No. 15-4, PageID.383). According to the Southfield Non-Profit Housing Corporation, the transfer was part of an ongoing relationship with the City of Southfield whereby the NRI (a limited liability corporation with the Southfield Non-Profit Housing Corporation being the only member) would "[purchase] tax foreclosed and other properties, [improve] such properties, [then sell] such properties to persons of low to moderate income [thus] improving housing and homeownership opportunities in the City of Southfield and [thereby] restore tax-foreclosed properties to the tax-roll." (ECF No. 15-1, PageID.359).

Plaintiff alleges that she was "illegally evicted" from her house by various individuals and that some of these individuals "broke in and changed her locks … without the benefit of a court order." (ECF No. 8, PageID.120). The specific date plaintiff left her residence is not entirely clear. At one point in her response to the motions to dismiss plaintiff states that the "illegal home invasion" occurred on October 6, 2016. (ECF No. 22, PageID.520). In the affidavit attached to her response plaintiff asserts that the event took place on October 4, 2016. (ECF No. 22, PageID.526). The photographs attached to the brief in support of the motion of the Southfield Non-Profit defendants to dismiss, which purport to show the condition of the premises at the time plaintiff left, bear the date November 14, 2016. (ECF No. 15-5, PageID.385). Plaintiff alleges that employees of GTJ Consulting, LLC and JBR Disposal, LLC, "took" her from her home. (ECF No. 8, PageID.120). The

Southfield Non-Profit defendants claim that plaintiff's home was "deplorable" and "unhealthy" and she was "assisted" in moving to a "safe, clean and affordable apartment" when she left the residence. (ECF No. 15-1, PageID.360). Defendants do not claim to have had a court order to enter her home and remove her.

Plaintiff filed the present amended complaint alleging a number of claims all arising out of the 2016 foreclosure of her residence in Southfield, Michigan, and her subsequent departure from that residence. The allegations include violations of the Fair Housing Act, violations of Michigan statutory and common laws regarding illegal property transfer, Constitutional violations actionable through 42 U.S.C. § 1983, violations of the Racketeer Influenced Corrupt Organization Act (RICO), 18 U.S.C. § 1961, *et seq.*, forcible illegal eviction in violation of state law, and conversion in violation of Michigan statutory and common laws. (ECF No. 8, PageID.132-141).

The relief plaintiff requests includes (1) a declaratory judgment that defendants have violated the Fair Housing Act, and (2) injunctions that would (a) order the creation of new rules regarding the transfer of property sold in a tax sale, (b) return plaintiff to the position she was in prior to the foreclosure, (c) "reverse the tax foreclosure," (d) require an immediate forensic accounting, and (e) require that documents be produced that would relate to "all property sales" during 2016, 2017, and 2018. In addition, plaintiff asks that defendants be enjoined from "usurping rights of African-Americans to bid on properties at public auctions." Besides the injunctive relief, plaintiff seeks money damages. (ECF No. 8, PageID.145-48).

The responding defendants can be grouped into three categories including: (1) the City of Southfield defendants[1], (2) the Southfield Non-Profit Housing Corporation defendants[2], and (3) the Oakland County defendants[3]. The City of Southfield defendants (hereinafter Southfield) filed a motion to dismiss seeking dismissal of the amended complaint under Fed. R. Civ. P. 12(b)(1) claiming lack of subject matter jurisdiction. (ECF No. 13). The Southfield Non-Profit Corporation defendants (hereinafter Southfield Non-Profit) also filed a motion to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(1) claiming lack of subject matter jurisdiction and under Fed. R. Civ. P. 12(b)(6) claiming failure to state a claim. (ECF No. 15). The Oakland County defendants (hereinafter Oakland) filed a motion seeking the dismissal of the amended complaint under Fed. R. Civ. P. 12(b)(1) claiming lack of subject matter jurisdiction and under Fed. R. Civ. P. 12(b)(6) claiming failure to state a claim. (ECF No. 17).

All three categories of defendants seek to have the amended complaint dismissed based on the provisions of the Tax Injunction Act (28 U.S.C. § 1341) and

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[1] These defendants include the City of Southfield, Frederick Zorn, Gerald Witkowski, Sue Ward-Witkowski, Irv Lowenberg, Michael Mandlebaum, Donald Fracassi, Daniel Brightwell, Myron Fraser, Lloyd Crews, and Nancy Banks.

[2] These defendants include the Southfield Non-Profit Housing Corporation, the Southfield Neighborhood Revitalization Initiative, LLC., Mitchell Simon, Rita Fulgiam Hillman, Lora Brantley-Gilbert, Earlene Trayler-Neal, and E'Toile Libbits.

[3] These defendants include Oakland County and Oakland County Treasurer Andy Meisner, in his official capacity.

principles of comity. (ECF No. 13, PageID.290; ECF No. 15-1, PageID.365; and ECF No. 17, PageID.447).

In her response to the arguments regarding the Tax Injunction Act (TIA) and comity, plaintiff comments on the application of the TIA and comity but did not directly address the applicability of it to her circumstances. (ECF No. 22, PageID.520-21). In an apparent reference to the availability of adequate state remedies, plaintiff did mention that attempts by others to litigate similar claims in state court had been unsuccessful. (ECF No. 22, PageID.517-18). Plaintiff also responded to the defendants' motions to dismiss by arguing that the foreclosure of her residence was akin to the civil in rem forfeiture that the Supreme Court found to be in violation of the excessive fines clause of the 8th Amendment citing *Timbs v. Indiana,* 568 U.S. 2 (2019). Additionally, plaintiff contended she was improperly denied a property tax exemption based on her income level which, if granted, would have allowed her to pay a reduced property tax. (ECF No. 22, PageID.516). With respect to the *Rooker-Feldman* doctrine, plaintiff contends she was not trying to have a state court judgment reversed – she was merely seeking to vindicate her constitutional rights in federal court. (ECF No. 22, PageID.523).

III. DISCUSSION

A. Motion to Dismiss

All three of defendants' motions include arguments that are characterized as motions to dismiss based on lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Two varieties of Rule 12(b)(1) motions exist: one is a facial challenge to the lawsuit

where a defendant challenges the complaint on its face in an attempt to show the court lacks subject matter jurisdiction and the second variety is where a defendant challenges the factual basis of the complaint in an attempt to make the same showing. In the former circumstances the court takes the allegations of the complaint as true and in the latter circumstances the court is free to weigh the evidence and "no presumptive truthfulness" attaches to the allegations in the complaint. In either situation, the plaintiff has the burden of proof that the court has subject matter jurisdiction. *RMI titanium Co. v Westinghouse Electric Corp. et al.*, 78 F.3d 1125, 1133-1135 (6th Cir. 1996). The motions to dismiss appear to be a facial challenge to the amended complaint where the allegations in the complaint are taken as true.

B. Tax Injunction Act and Comity

All three categories of defendants contend that the Tax Injunction Act, 28 U.S.C. § 1341, bars federal district courts from addressing certain types of cases that seek to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." To the extent a plaintiff is seeking damages other than injunctive relief, defendants must look outside of the TIA because that legislation is limited to injunctive relief. However, relief including money damages, as well as injunctive relief, is available under the principles of comity which is a separate, but related area of the common law that prohibits plaintiffs seeking money damages arising out of states attempting to collect taxes. *Wright v Pappas*, 256 F.3d 635, 637 (7th Cir. 2001).

Plaintiff is clearly an intelligent individual, but she is not a lawyer and therefore her pleadings are viewed differently than those drafted by an attorney. *Pro se* litigants are entitled to a more liberal reading than pleadings drafted by a lawyer. *Thomas v. Eby*, 481 F.3d 434, 437 (6th Cir. 2007). That being said, the pleadings must still generally comply with the legal standards for matters pending in federal court. *Davis v. Prison Health Services*, 679 F.3d 433, 437-38 (6th Cir. 2012). The amended complaint sets out six causes of action as noted above. A separate section of the complaint addresses the relief plaintiff is requesting and, for the most part, the relief requested is not linked to the specific causes of action. The type of relief requested is critical in determining if the court has subject matter jurisdiction as limited by the TIA or the principles of comity.

Plaintiff's requested relief includes: (1) "declaring" the "policies and practices" of Oakland and Southfield violate the Fair Housing Act; (2) "enjoining" Oakland from continuing their current practices employed for disposing of tax foreclosed properties and requiring the creation of "rules" that would penalize some of those practices; (3) ordering all defendants to "return" plaintiff to the position she was in before the tax foreclosure process and award plaintiff monetary damages that are allowable under M.C.L. §§ 600.2918 and 600.2919(a); (4) ordering Oakland to "correct" discriminatory practices; (5) ordering Oakland and Southfield to "restore" plaintiff to the "position Plaintiff would have occupied but for discriminatory conduct;" (6) ordering Oakland to "reverse the tax foreclosure" and provide "marketable title" to plaintiff; (7) ordering "Defendant corporations" and Southfield Non-Profit to provide a "forensic

accounting" of "all monies received and expended" relating to the foreclosure of plaintiff's property and that of 116 or more other properties that were foreclosed on in 2016, 2017, and 2018; (8) ordering Southfield Non-Profit to "provide documentation" of all property sales regarding property transfers in 2016, 2017, and 2018 and to "rescind and revert" any of those transfers that were improper; (9) ordering Oakland to discontinue transferring foreclosed properties to private corporations contrary to M.C.L. § 213.23(2); ordering Southfield and Southfield Non-Profit, as well as other named defendants, to "'cease usurping the rights of African-American Southfield residents to bid on properties at the public auction; and (10) ordering Oakland and "all other Defendants" to return plaintiff's property to the tax roles [sic]" and award monetary damages to plaintiff. (ECF No. 8, PageID.145-149).

While couched in different claims, it is clear that plaintiff's complaint is focused on the state tax foreclosure procedure that resulted in the loss of her property. Most of her claims, in one way or another, seek to invalidate the tax foreclosure process employed in her case or obtain monetary damages from some or all of the defendants for the wrongs that she claims to have suffered. Two of her claims, illegal eviction and conversion, are state law-based claims that do not seek to invalidate the tax foreclosure process.

The TIA addresses any attempt to "enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. This federal statute "creates a jurisdictional barrier … for claims of declaratory or injunctive relief brought by a

party aggrieved by a state's administration of its taxing authority." *Pegross v. Oakland Cnty. Treasurer*, 592 F.App'x 380, 384 (6th Cir. 2014). Without doubt the tax foreclosure procedure at the heart of plaintiff's complaint is a core aspect of a "state's administration of its taxing authority." To the extent that plaintiff's amended complaint seeks to declare as improper or enjoin the tax foreclosure procedure that resulted in the loss of her home, those efforts would be barred by the TIA as long as there is a "plain, speedy and efficient remedy [that] may be had in the courts of such State." 28 U.S.C. § 1341.

Defendants also invoke a related, but independent, common-law principle that would, if applicable, serve to prevent a federal district court from taking jurisdiction of challenges to state tax administration. This principle, referred to as comity, is a form of abstention that prevents federal district courts from becoming entangled in state tax disputes. This principle is "substantially broader" than the bar imposed by the Tax Injunction Act. *In re Gillis*, 836 F.2d 1001, 1006 (6th Cir. 1988). A part of plaintiff's prayer for relief is a request for monetary damages. This type of relief is outside the scope of the "declaratory or injunctive" relief that is barred by the TIA but comes within the parameters of the comity principle. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110 (1981). The comity principle also requires a state court remedy to be available to the plaintiff before the case will be barred from federal district court. Under the comity principle, the state court remedy must be "plain, adequate, and complete" in order for the case to be barred. *Id.* 454 U.S. at 116. It is really the nature of the relief sought, rather than the specific claims, that determine the applicability of

the TIA/comity standards. Attempts to challenge the state's tax administration are subject to those standards without regard to specific claims made.

While the definition of the state court remedy required by both the TIA and the comity principle differs in wording, there is "no significant difference" between the "plain, speedy, and efficient remedy" identified in the TIA and the "plain, adequate, and complete" state remedy identified in the comity principle. *Id.* 454 U.S. at 116 n. 8. State "remedies are plain, adequate, and complete if they provide the taxpayer with a full hearing and judicial determination at which the taxpayer may raise any … objections to the tax." *Gillis*, 836 F.2d at 1010.

On four recent occasions this court, speaking through four different judges, has addressed situations in which property owners have challenged state foreclosure proceedings under the GPTA. In each of these occasions the judges consistently determined that the court lacked jurisdiction to entertain claims pursued in federal court that would in some manner "enjoin, suspend, or restrain" the collection of state taxes or the enforcement of the GPTA. In *Rafaeli, LLC v. Wayne County*, 2015 WL 3522546 (E.D. Mich, June 4, 2015), Judge Berg concluded that the TIA and the principles of comity barred federal district courts from considering the plaintiffs' constitutional challenges to the GPTA. Judge Berg determined that plaintiff's challenges were "for claims of declaratory or injunctive relief brought by a party aggrieved by a state's administration of its taxing authority" and that "a plain, adequate, and complete remedy [was] available

in the state courts." *Id.*, at 7-8.[4] Adequate state remedies were identified by Judge Berg as existing in the GTPA, M.C.L. § 211.78l, and the Oakland County Circuit Court. *Id.*

The following year Judge Levy considered claims of a purported class action that brought constitutional and statutory challenges regarding the Michigan GPTA. In *Hammoud v. County of Wayne*, 2016 WL 4560635 (E.D. Mich. 2016), *aff'd* 697 Fed. App'x 445 (6th Cir. 2017), Judge Levy, contrary to the plaintiff's argument, determined that the constitutional claims and some of the state statutory claims sought to "set aside the judgments of foreclosure, vest title back in plaintiffs' names, and permit plaintiffs to pay the back taxes owed" and therefore that relief "would certainly 'enjoin, suspend or restrain the assessment, levy or collection of a [ ] tax under State law'" thus triggering the prohibitions of the TIA and requiring the dismissal of those claims. *Id.* at 4. The opinion further noted that various state court remedies were available to plaintiffs, citing a number of state court cases in which similar claims were adjudicated. The comity

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[4] Plaintiffs in that case have pursued related constitutional claims in state court and leave to appeal from an unfavorable decision in the Michigan Court of Appeals has been granted by the Michigan Supreme Court, *Rafaeli, LLC v. Oakland County*, 503 Mich. 909 (2018), with oral argument scheduled to take place in November of 2019, *Rafaeli, LLC v. Oakland County*, 932 N.W.2d 1 (2019). The Michigan Supreme Court held oral argument, and on November 27th allowed the parties to file post-argument supplemental briefing by December 13th. *Id.* at 935 N.W.2d 354. Both parties filed supplemental briefs. *See* filings listed on state Supreme Court website, https://courts.michigan.gov/Courts/MichiganSupremeCourt/oral-arguments/2019-2020/Pages/156849.aspx.

principle relating to federal district court jurisdiction of state tax administration was not a part of Judge Levy's analysis. A civil RICO claim and several state statutory claims were also dismissed in the ruling but for different reasons. Judge Levy concluded that these statutory claims did not directly threaten the state tax administration and therefore the TIA did not apply to these claims. The civil RICO claim was dismissed because the complaint did not properly allege the requirements of such a claim and the remaining state statutory claims were dismissed because all the federal claims were being dismissed and the court did "not have supplemental jurisdiction to address" the state statutory claims in the absence of a cognizable federal claim. *Id.* at 8. Adequate state remedies were identified in the ruling on these claims that were similar in many respects to the claims in the present case. *Id.* at 5.

In *Freed v. Thomas*, 2018 WL 5831013 (E.D. Mich. Nov. 7, 2018)[5] Judge Friedman dismissed, for lack of subject matter jurisdiction, constitutional claims regarding the Michigan GTPA based on the TIA and comity principles. *Id.* at 3. Judge Friedman, echoing the views of several other judges, characterized the GTPA as an "unfair tax collection regimen" but was bound by *Wayside Church v. Van Buren County*, 847 F.3d 812 (6th Cir. 2017) to rule that the federal district courts, when adequate remedies exist in Michigan courts, did not have subject matter jurisdiction over challenges to the GTPA. *Id.* Citing *Wayside Church* again, Judge Friedman found that the plaintiff had adequate state remedies, even if

[5] This decision is currently on appeal to the Sixth Circuit.

those remedies were not likely to result in the relief plaintiff was seeking. *Id.* at 4, n. 1).

More recently, Judge Borman dismissed a complaint with a strikingly similar set of claims to the present amended complaint. In *Edwards v. Meisner*, 2019 WL 78890 (E.D. Mich. Jan. 2, 2019) the plaintiff had attempted to challenge the tax foreclosure sale of his residence in the City of Southfield through litigation in Oakland County Circuit Court. That effort proved unsuccessful for the plaintiff and the Southfield Neighborhood Revitalization Initiative, LLC, the title holder to the property following the foreclosure sale, obtained a judgment of eviction from a state district court. Plaintiff filed the complaint in federal court and sought a preliminary injunction to halt the eviction pursuant to the state court order. Judge Borman denied the motion for a preliminary injunction and, *sua sponte*, dismissed the complaint for lack of subject matter jurisdiction. The ruling was based initially on the *Rooker-Feldman* doctrine[6] in that the relief requested by plaintiff could not be granted without invalidating the state court judgment of foreclosure and the state court judgment of eviction which, under *Rooker-Feldman,* the district court does not have jurisdiction to do. Judge Borman also ruled, even if *Rooker-Feldman* did not apply, that the TIA and comity principles barred the district court from assuming jurisdiction of plaintiff's claims in that in

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[6] The *Rooker-Feldman* doctrine is based on two Supreme Court decisions, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Co.* 263 U.S. 413 (1923), which stand for the proposition that under 28 U.S.C. § 1257(a) lower federal courts do not have subject matter jurisdiction to review the decisions of state courts.

order to grant the relief plaintiff requested the court would have to "enjoin, suspend or restrain the assessment, levy or collection of [a] tax under State law." 28 U.S.C. § 1341. Judge Borman recognized the requirement, for application of the TIA and comity principles, that an adequate state court remedy must exist and pointed to plaintiff's efforts to litigate the same issues in state court prior to filing the action in federal court as proof that such remedies existed. The decision that adequate state remedies existed, for purposes of imposing the jurisdictional limitations of the TIA and comity principles, was made regardless of whether those remedies had been successful, would be successful, or even if those remedies had lapsed. As long as state remedies could have been pursued, they were adequate. 2019 WL 78890, at 8-9.

The above cases from this district establish a well-worn path for dismissing cases filed in the federal district court that challenge the tax foreclosure and revenue raising scheme of the State of Michigan under the TIA and principles of comity. That path should be followed here as well. While plaintiff presents as a sympathetic individual in unfortunate circumstances, federal law clearly establishes jurisdictional barriers to challenges to the administration of state taxation procedures. Plaintiff has the burden of proof to establish subject matter jurisdiction and that burden has not been met here. Counts One through Four of the amended complaint allege violations of constitutional or statutory rights relating directly to the tax foreclosure and sale of plaintiff's residence in 2016. The relief plaintiff requests is not linked to specific claims but does include declaratory relief, injunctive relief, and money damages. To grant that requested relief would require this court to

"enjoin, suspend or restrain the assessment, levy or collection of [a] tax under State law" which this court in not permitted to do under the TIA. The TIA only prohibits declaratory or injunctive relief but a request for damages arising out of a tax collection process is barred by the free-standing principle of comity. *Pegross v. Oakland County Treasurer*, 592 F.App'x 380, 386 (6th Cir. 2014). Plaintiff does not claim that adequate state remedies do not exist – only that such remedies are likely to be unsuccessful. Likelihood of success is not the test of adequacy for purposes of the TIA or comity. Four judges in this district, as noted above, found that adequate remedies existed in the Michigan state courts for the grievances alleged in those cases and those are the same, or substantially similar, to the grievances plaintiff here alleges.

Counts Five and Six of plaintiff's amended complaint present a different set of circumstances. Those claims, "Forcible Illegal Eviction Under State Law" (Count Five) and "Conversion" (Count Six) are based on alleged violations of Michigan statutory and common law. Plaintiff seeks money damages for both of these claims. An award of damages in either of these claims would not "enjoin, suspend or restrain the assessment, levy or collection" of a state tax. The TIA "operates 'particularly' to protect the States' 'revenue raising' mechanisms" through the taxation process. *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499, 502 (6th Cir. 2008) (quoting from *Wright v. McClain*, 835 F.2d 143, 144 (6th Cir. 1987)). Here, the revenue had already been raised by the time the plaintiff was allegedly removed from her residence and her personal possessions were taken by the private actors who had come to clean out her house. Although the TIA/comity broom does not sweep counts

Five and Six away they have to be dismissed for another reason. State claims can only be pursued in federal court if they are "supplemental" to appropriate federal claims pending in the same action. 28 U.S.C. § 1367. With Counts One through Four dismissed there are no other federal claims remaining and Counts Five and Six must also be dismissed without prejudice.

C. *Rooker-Feldman* Doctrine

Defendants Oakland and Southfield contend that a second basis for dismissal of the complaint for lack of subject matter jurisdiction is the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine reflects the statutory provisions of 28 U.S.C. § 1257(a) which provides that review of state court judgments lies in the Supreme Court, rather than federal district courts. The doctrine applies to "state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). "Nor does [*Rooker-Feldman*] stop a district court from exercising subject matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal court plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which it was a party …, then there is jurisdiction and state law determines whether

the defendant prevails under principles of preclusion.'" *Id.* (quoting *GASH v. Vill. Of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993) (ellipses in original)).

In applying *Rooker-Feldman,* the appropriate "inquiry … is the source of the injury the plaintiff alleges in the federal complaint. If the source of the injury is the state court decision, then the *Rooker-Feldman* would prevent the district court from asserting jurisdiction. If there is some other source of injury, such as a third party's actions, then the plaintiff asserts an independent claim" and *Rooker-Feldman* does not bar the claim in federal court. *McCormick v. Braverman*, 451 F.3d 382, 393 (6th Cir. 2006).

Both defendants that have raised *Rooker-Feldman* in their motions to dismiss seek to have the entire amended complaint dismissed on that basis. Their analysis does not reflect the nuanced approach that is necessary to properly consider the *Rooker-Feldman* doctrine as a basis for dismissing plaintiff's amended complaint.

In determining the applicability of the *Rooker–Feldman* doctrine, federal courts "cannot simply compare the *issues* involved in the state-court proceeding to those raised in the federal-court plaintiff's complaint," but instead "must pay close attention to the *relief* sought by the federal-court plaintiff." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir. 2003) (emphasis in original); *Berry v. Schmitt*, 688 F.3d 290, 299 (6th Cir. 2012). Where the plaintiff seeks injunctive and declaratory relief prohibiting the future application of a statute, and not to overturn the state court's judgment under that statute, *Rooker-Feldman* does not apply. *Hood v. Keller*, 341 F.3d 593, 598 (6th Cir. 2003). However, where the plaintiff

seeks to overturn the state court rulings, and not just a declaration that the applicable state law is unconstitutional, *Rooker-Feldman* applies.

Plaintiff alleges six distinct claims in her amended complaint. (ECF 8). Those claims include: (1) race discrimination, (2) illegal property transfer in violation of state law, (3) due process, (4) RICO, (5) forcible illegal eviction, and (6) conversion. The only state court judgment in the history of this case is the judgment of foreclosure entered on February 2, 2016. Counts 5 and 6 of the amended complaint relate to allegations regarding plaintiff's removal from her residence in approximately October of 2016 and these counts include specific requests for money damages. With respect to these two counts, the injury claimed is not based on a state court judgment and therefore these claims are not barred by *Rooker-Feldman.*

The first four counts of plaintiff's amended complaint raise claims that, it could be argued, are not based directly on the state court judgment of foreclosure. However, the general prayer for relief seeks, among other things, relief that includes "return[ing]" plaintiff to the position she was in, "restor[ing]" plaintiff to the position she was in before defendants' conduct, and "revers[ing] the tax foreclosure against" her. (ECF No. 8, PageID.146-47). As noted above, the relief requested is more the measure of the application of *Rooker-Feldman* than the specific claims made. In that the relief requested is generally alleged it cannot be determined, from the face of the amended complaint, whether the request to "restore" plaintiff to the position she was in before the judgment of foreclosure is applicable to a single claim or all four of claims alleged in Counts 1-4.

Plaintiff's amended complaint is almost a word-for-word copy of the complaint in *Edwards v. Meisner*, Case No. 18-cv-13488 (E.D. Mich.). As noted above, Judge Borman dismissed that complaint for lack of subject matter jurisdiction in part based on *Rooker-Feldman*. In his ruling on the *Rooker-Feldman* question, Judge Borman stated that if the plaintiff was seeking the reversal of the state court judgment of foreclosure then dismissal under *Rooker-Feldman* was appropriate. Judge Borman went on to state that he could not "award [plaintiff's requested] relief without invalidating the state court judgment of foreclosure and order of eviction [and therefore] *Rooker-Feldman* applies and bars this Court from exercising jurisdiction over Plaintiff's claims seeking to invalidate these state court judgments." 2019 WL 78890, at 7.[7]

The undersigned agrees with Judge Borman's ruling in *Edwards*. The same claims were made in that case as were made in Counts 1-4 of the present amended complaint. The same relief was requested there as well and it sought to invalidate the prior state court judgment of foreclosure just as plaintiff is attempting to do here. On that basis, Counts 1-4 of the present amended complaint should be dismissed pursuant to *Rooker-Feldman* for lack of subject matter jurisdiction in this court. Counts 5-6 should not be dismissed on the same basis.

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[7] The *Edwards* case had two state court judgments to consider, one for foreclosure and a second judgment for eviction. The present case does not include an eviction judgment but that does not change the application of *Rooker-Feldman* to the facts of this case because the relief requested necessarily reached the foreclosure judgment even if there was no eviction judgment.

Res Judicata

The Oakland and Southfield Non-Profit defendants assert that the amended complaint should be dismissed based on principles of res judicata. In essence, these defendants contend that the claims plaintiff has raised in her amended complaint should be dismissed because they could have been raised in the tax foreclosure proceedings that resulted in a judgment of foreclosure in state court. "The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings 'shall have the same full faith and credit in every court within the United States … as they have by law or usage in the courts of such State … from which they are taken.'" *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985), quoting from 28 U.S.C. § 1738. "'It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.'" *Id.*, quoting from *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-482 (1982).

"Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Sewell v. Clean Cut Mgmt, Inc.*, 463 Mich. 569, 575 (2001). "The test for determining whether two claims arise out of the same transaction and are identical for res judicata

purposes is whether the same facts or evidence are essential to the maintenance of the two actions." *Jones v. State Farm Mut. Auto. Ins. Co.*, 202 Mich. App. 393, 401 (1993). Defendant Southfield Non-Profit alleges that "the relief sought by Plaintiff in this case is the same as in her State Court proceedings." (ECF No. 15-1, PageID.370). It is not entirely clear what counsel meant by that statement because there is nothing in this record to suggest that plaintiff actually appeared in state court and made any particular claims regarding the tax foreclosure of her former residence. If plaintiff did not appear in state court, as would appear to be the case here, the only issue actually addressed in the state court proceeding was whether the property was delinquent in taxes, interest, penalties, and fees and whether the property had been redeemed. M.C.L. § 211.78g-211.78h. If these findings were made the final judgment of foreclosure would issue under M.C.L. § 211.78k(5).

There is at least one exception to the broad application of the doctrine of res judicata in Michigan. In *J.A.M. Corp. v. AARO Disposal, Inc.*, 461 Mich. 161 (1999) the Michigan Supreme Court reviewed a situation in which the plaintiff had previously litigated a matter under the Michigan summary proceedings law, M.C.L. § 600.5701 *et seq.*, in state district court and then later pursued other claims in state circuit court. In the court's analysis of a res judicata defense to the circuit court action, it was noted that a section of the summary proceedings law, MCL § 600.5750, "evidences the Legislature's intent that summary proceedings for possession of property be handled expeditiously. Plainly the Legislature took these cases outside the realm of the normal rules concerning merger and bar in order that attorneys would not be

obligated to fasten all other pending claims to the swiftly moving summary proceedings." *Id.* at 168-69. Later the court noted that "in light of the first sentence of MCL 600.570 … clarifying that the remedy in these summary proceedings, no matter who prevails, does not bar other claims for relief" and reversed the decisions of lower courts, that had ruled res judicata barred the claims made by plaintiff in circuit court. *Id.* at 170-71.

The Michigan tax foreclosure law bears some resemblance to the summary proceedings law with respect to a perceived legislative intent to create an expedited procedure for foreclosure in tax delinquency cases, as compared to the general foreclosure procedure. The tax foreclosure procedure condenses the process for obtaining a judgment, has a shorter redemption period than the general Michigan foreclosure procedure,[8] and eliminates the possible payment of a surplus to the delinquent party.[9]

These factors evidence an intent to streamline the foreclosure process in tax delinquency circumstances. Additionally, and particularly significant for a res

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[8] The general foreclosure procedure calls for a six-month redemption period, M.C.L. § 600.3140(1), whereas the tax foreclosure procedure calls for a 21-day redemption period in contested cases. M.C.L. § 211.78i(6)(g).

[9] The general foreclosure procedure provides for the payment of any surplus generated after subtracting the delinquency owed from the proceeds of the public sale whereas the tax foreclosure procedure does not require such payment. This aspect of the tax foreclosure procedure has sparked judicial criticism of the process including, as noted earlier, Judge Friedman's characterization of the process as an "unfair tax collection regimen." *Freed v. Thomas*, 2018 WL 5831013 at 3 (E.D. Mich. Nov. 7, 2018).

judicata analysis, is the statutory limitation on the issues that can be litigated in the tax foreclosure process. M.C.L. § 211.78k(2) identifies only six issues that can be raised by "the person claiming an interest in a parcel of property" subject to the tax foreclosure process and none of these limited issues are comparable to the issues raised by plaintiff in Counts 1-4 of her amended complaint. Litigating the claims made in plaintiff's amended complaint would clearly involve facts beyond those that were, or could have been litigated in the state court tax foreclosure proceeding.

While without question the Michigan res judicata law is "broad" and includes issues that were raised in a prior litigation as well as issues that "could" have been raised, it does not appear that plaintiff could have raised her claims in the tax foreclosure process given the jurisdictional limitations on that process provided for in M.C.L. § 211.78k(2). Counts 5-6 of the amended complaint are obviously outside the scope of what could have been litigated in the tax foreclosure matter because they took place months after the tax foreclosure judgment was entered.

Both of these groups of defendants cite *Anderson v. County of Wayne*, 2011 WL 2470467 (E.D. Mich. Jun 20, 2011) in support of their arguments that plaintiff's amended complaint should be dismissed based on principles of res judicata. *Anderson* did involve a matter previously litigated in a Michigan tax foreclosure proceeding that was brought to federal district court by the plaintiff in an attempt to have the federal court "vacate" the state foreclosure judgment. In ruling that the federal claim was barred by res judicata principles, Judge Borman stated that the exact issue raised in the federal case - whether plaintiff should be

permitted to make partial payments on the tax liabilities - had been litigated in state court and it was the only issue litigated in the state court. That fact distinguishes it from the present case in that Judge Borman did not address the scope of what could have been raised in the state court tax foreclosure case.

Based on the above analysis, the undersigned concludes that res judicata does not bar plaintiff's amended complaint.

D. Failure to State a Claim

Defendants Oakland and Southfield Non-Profit also seek to have the amended complaint dismissed due to the plaintiff's failure to state a claim on which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). In light of the undersigned's conclusion that this case should be dismissed in its entirety based on the TIA, principles of comity, as well as the *Rooker-Feldman* doctrine, it is not necessary to address the defendants' arguments under Rule 12(b)(6).

IV. RECOMMENDATION

For the reasons set forth above, the undersigned **RECOMMENDS** that the case be **DISMISSED WITHOUT PREJUDICE**.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not

preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed.R.Civ.P. 72(b)(2), Local Rule 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: January 9, 2020 s/Michael J. Hluchaniuk
Michael J. Hluchaniuk
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on January 9, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send electronic notification to all counsel of record and by regular first-class mail to NON-ECF Participant: Marion Sinclair, 25325 Grodan Dr., Apt. 220, Southfield, MI 48022.

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